

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, <i>Plaintiff,</i> v. FACEBOOK, INC., <i>Defendant.</i>	Civil Action No.: 2018 CA 008715 B Judge Fern Flanagan Saddler Next Event: Status Hearing Date: October 16, 2019
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**DISTRICT OF COLUMBIA’S OPPOSED
MOTION FOR ENTRY OF PROTECTIVE ORDER**

1. This is a consumer protection enforcement action brought by the District of Columbia (“District”), through its Office of the Attorney General (“OAG”), against Defendant Facebook, Inc. (“Facebook” or the “Company”). The lawsuit is presently in discovery, and the District moves the Court to enter the Protective Order attached as Exhibit A to facilitate document production in this case.

2. The proposed Protective Order is modelled on OAG’s standard protective order that is intended to balance the public’s interest in government enforcement actions and confidentiality interests. The Order is tailored to prevent public disclosure of specific categories of sensitive information obtained in discovery. In particular, it protects trade secret and sensitive commercial information consistent with District law (*see* D.C. Code § 2-534(a)(1) exempting from FOIA disclosure “[t]rade secrets and commercial or financial information” “to the extent that disclosure would result in substantial harm to the competitive position of the [company]”); it also protects against the disclosure of personally identifiable information when disclosure constitutes an unwarranted invasion of personal privacy.

3. These protections are more than sufficient and should not be expanded in light of the strong presumption of public access to court records, which are heightened in a government

enforcement case. Indeed, this Court has entered a protective order containing substantially similar language relating to discovery in another complex litigation pending before it, which was consented to by both parties. *See* Protective Order, *D.C. v. Power Design, Inc.*, Case No. 2018 CA 005598 B (D.C. Super. Ct. Apr. 29, 2019) (Saddler, J.); *see also* Protective Order, *D.C. v. CashCall, Inc.*, Case No. 2018 CA 006904 B (D.C. Super. Ct. Nov. 15, 2016). The proposed Protective Order differs from these other orders insofar as the District has agreed to proposals by Facebook.

4. Prompt entry of this Protective Order is needed so that document production can commence. Although the parties are now over three months into discovery, to date, Facebook has refused to produce a single document until the entry of a protective order.

5. For more than two months, the District has made good faith attempts to reach agreement with Facebook on a proposed protective order, to no avail. Facebook first raised the matter of a stipulated protective order on June 28, 2019, a few days before the Company's responses to the District's first and second sets of document requests were due. The District demonstrated good faith and acted diligently in attempting to resolve this issue by providing Facebook—that same day—with a proposed protective order which has been adopted in other complex consumer protection enforcement actions involving the District. Facebook in turn did not provide any response to the District's proposal for over six weeks, despite renewed discussion of this issue at the August 2, 2019 status conference.

6. On August 12, 2019, having received no feedback from Facebook for more than a month, the District informed Facebook that it intended to move for entry of the proposed Protective Order that was originally sent for review on June 28, 2019. Only then did Facebook provide the District with a substantially rewritten version of the District's proposed protective

order, adding ten pages of new provisions, many of which are inapplicable to a government enforcement action. Among other things, Facebook's counterproposal significantly expanded the definition of confidential information beyond what is recognized by District law and included provisions related to patent prosecution, which are in no way implicated by the District's consumer protection claims.

7. The District promptly raised its concerns with Facebook's counterproposal during lengthy meet-and-confers on August 14 and August 16. After receiving modified language from Facebook on August 21, the District exchanged the Protective Order attached as Exhibit A with Facebook. In an effort to reach a consensus, the District's proposed Protective Order adopts substantial portions of Facebook's counterproposal. However, after a final meet and confer on September 13, the parties were unable to agree on other key provisions, including:

8. **The definition of "Confidential."** Facebook's counterproposal included a definition of "Confidential" information that would encompass all "information that a party has a good faith belief qualifies for protection under Superior Court Rule of Civil Procedure 26(c)." To the best of the District's understanding, Facebook intended this definition to capture all non-public documents. Further, the District would be required to file under seal any pleading containing information deemed "Confidential" by Facebook. The practical effect of Facebook's sweeping definition is that much, if not all, of the discovery that becomes part of the judicial record in this case would remain shielded from public view. Facebook's definition therefore does not appropriately balance the public's strong interest in the openness of judicial proceedings, especially government enforcement actions, with the parties' confidentiality interests. *See Upshaw v. United States*, 754 F. Supp. 2d 24, 28 (D.D.C. 2010); *Doe v. Public Citizen*, 749 F.3d 246, 271 (4th Cir. 2014) (the interest of the public is at its "apex" where the "government is a

party to the litigation”). The District’s proposal—which would (consistent with District law) require the parties to seal records that contains trade secrets, sensitive commercial information, or personally identifiable information—strikes the proper balance. Indeed, Facebook implicitly recognized the merit of the District’s approach when it agreed to substantially unseal the internal Facebook document that was previously the subject of Facebook’s motion to seal. *See* August 29, 2019 Joint Consent Motion Regarding Motion to Seal.

9. **Attorneys’ eyes-only designation.** Facebook’s counterproposal also included a second, “Highly Confidential” designation that would apply to “extremely sensitive” information. Documents deemed “Highly Confidential” by Facebook could not be shared with consultants, professional vendors, mediators, certain deposition witnesses, and other law enforcement agencies, regardless of whether these individuals or entities agree to be bound by the Protective Order. While two-tiered confidentiality designations (attorneys eyes-only) may sometimes be appropriate, it serves no purpose in the context of this government enforcement action other than to impede the District’s case preparation. *See MGP Ingredients, Inc. v. Mars, Inc.*, No. CIVA 06-2318 JWLDJW, 2007 WL 756645, at *3 (D. Kan. Mar. 8, 2007). There is no “good cause” to prevent individuals involved in this case such as professional vendors, for example, from accessing Facebook’s technical information provided they agree to be bound by the Protective Order.

10. **Expert disclosure and “veto.”** Relatedly, Facebook’s proposal would have required the parties to follow an onerous process to seek consent before disclosing “Highly Confidential” information with experts, including non-testifying experts. To secure that consent from Facebook, the District would need to provide Facebook with the identity of and background on the District’s expert. Facebook could then object to the District’s choice, and the ability to

proceed would only be resolved with further motion practice. As an initial matter, under Super. Ct. Civ. R. 26(b)(4)(D), the identity of non-testifying experts is non-discoverable work product protected from disclosure absent “showing exceptional circumstances.” Facebook’s conclusory assertion that its information is “extremely sensitive” does not justify an intrusion into the District’s litigation strategy and the unjust advantage that would result. *See MGP Ingredients*, 2007 WL 756645, at *3. Further, to the extent this language was triggered, Facebook’s counterproposal would result in undue burden, needless delays, and unnecessary motions practice. An expert’s written acknowledgment to be bound by the terms of a protective order is sufficient to protect a party’s confidential information.

11. In light of Facebook’s insistence on the inclusion of these provisions, as well as the considerable delay already caused by Facebook’s belated response to the District’s original proposal, the parties were unable to come to agreement on the terms of a protective order. The District therefore moves the Court to enter the attached Protective Order, which is substantially similar to protective orders entered by this Court in prior government enforcement actions. Any further delay of the entry of a Protective Order and the production of documents in this case prejudices the District and threatens to delay the resolution of this matter.

Dated: September 13, 2019

Respectfully submitted,

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POINTS AND AUTHORITIES IN SUPPORT

1. The Court's inherent power to control its own docket.
2. SCR-Civil R. 26(c).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 13, 2019, I caused the foregoing Motion for Entry of Protective Order to be served on all counsel of record via the court's CaseFileXpress e-filing service.

/s/ Jennifer M. Rimm
Attorney for the District of Columbia

SUPERIOR COURT RULE 12-I CERTIFICATION

Undersigned counsel contacted counsel for Facebook, Inc. to seek consent for the relief requested in this Motion. Facebook's counsel did not consent to the relief sought in this Motion.

/s/ Jennifer M. Rimm
Attorney for the District of Columbia